

LAW OFFICES

**SHOOK, HARDY & BACON LLP**

GENEVA  
HOUSTON  
KANSAS CITY  
LONDON  
MIAMI

84 CORPORATE WOODS  
10801 MASTIN, SUITE 1000  
OVERLAND PARK, KANSAS 66210-1671  
TELEPHONE (913) 451-6060 • FACSIMILE (913) 451-8879

NEW ORLEANS  
OVERLAND PARK  
SAN FRANCISCO  
TAMPA  
WASHINGTON, D.C.

July 15, 2002

**VIA FACSIMILE & REGULAR MAIL**

David L. Wornson, Esq.  
Attorney, Iowa Department of Natural Resources  
502 East 9<sup>th</sup> Street  
Des Moines, Iowa 50319



Re: Council Bluffs Former Manufactured Gas Plant (FMGP)

Dear Mr. Wornson:

On behalf of Aquila, Inc. ("Aquila"), formerly known as UtiliCorp United Inc., this responds to your letter of April 24, 2002. Thank you for your consideration in extending the time for this response to July 15, 2002. UtiliCorp United Inc. changed its name to Aquila on March 18, 2002.

The Department specifically requested that Aquila provide a description of the ownership and corporate history with respect to this site. In your letter of April 24, 2002, you state that, "[b]ased on some preliminary research of corporation history, Aquila, Inc. appears to be the successor to the Peoples Natural Gas Company, Northern Natural Gas Company and Council Bluffs Gas Company all of which owned and operated the FMGP." This is not correct.

On September 13, 1985, Aquila purchased the assets of the Peoples Natural Gas division of HNG/InterNorth, Inc. HNG/InterNorth, Inc. changed its name to Enron Corp. on April 10, 1986. A copy of the relevant portions of the 1985 Asset Purchase Agreement is enclosed. (Tab A). Aquila purchased only certain assets of a corporation that continued in existence for many years following the purchase. It is well settled that a corporation that purchases the assets of another corporation assumes no liability for the transferring corporation's debts and liabilities, unless specific language in the agreement or an established exception to the general rule applies. See, e.g., *Pancratz v. Monsanto Co.*, 547 N.W.2d 198, 200 (Iowa 1996).

The specific language of the 1985 Asset Purchase Agreement excludes MGP-related liabilities from the specific liabilities assumed by Aquila. The Specified Liabilities that Aquila agreed to assume under the terms of the 1985 Asset Purchase Agreement are set out in Schedule M of the Agreement. The Specified Liabilities do not include MGP liabilities.

In addition, the Agreement included certain indemnity obligations, and the parties executed an Assumption Agreement. *See* § 4.6(b) (Indemnification by Buyer) and Exhibit 6 (Form of Buyer's Assumption Agreement) (Tab A). In both the Indemnification and the Assumption Agreement Aquila agreed only to indemnify the Seller (Enron) for "liabilities or obligations with respect to all lawsuits, claims, demands, actions or suits, losses, costs or damages ***that are not recorded as liabilities on Seller's accounting books and records at Closing . . . .***"

MGP-related liabilities were included as liabilities in Enron's records as of the time of the closing of the 1985 transaction, as evidenced by Schedule J to the 1985 Asset Purchase Agreement. Schedule J lists litigation and other liabilities and specifically includes "Manufactured Gas Plant Sites." As "Manufactured Gas Plant Sites" were included in Enron's records at Closing as a liability, the indemnification and Assumption Agreement do not apply to those liabilities.

Therefore, Aquila disagrees with the Department's statements that it is a "successor" to Peoples Natural Gas Company, a division of InterNorth, Northern Natural Gas Company, and Council Bluffs Gas Company; that it is a "primary responsible party" for conducting further remedial response; or that it is a successor to an actual "operator" of the Council Bluffs FMGP. Neither Aquila nor any of its predecessors, operated the Council Bluffs MGP or caused the existence of a hazardous condition at the site.

Pursuant to Iowa Statute Section 455B.392, a party is only liable to the state or any other person for cleanup costs that are incurred "as a result of the failure of the person to clean up a hazardous substance involved in a hazardous condition ***caused by that person.***" (emphasis added) The Iowa Supreme Court has held that, in light of this language, any order by the Department "requiring implementation of a remedial action plan to abate or eliminate the soil or groundwater contamination must be limited to the extent of contamination caused by each" party. *Blue Chip Enterprises v. Iowa Dep't of Nat. Res.*, 528 N.W.2d 619, 624 (Iowa 1995).

In addition to requesting further "remedial response," the Department in its April 24, 2002 letter mentions further site investigation. As the current owner of a portion of the former MGP property, Aquila will work cooperatively with the Department and looks forward to further discussions. However, Aquila already has performed extensive investigation and characterization of the site under an Administrative Order on Consent

dated September 30, 1993 with EPA Region VII. Therefore, Aquila questions whether additional investigation and characterization of the site is necessary or helpful for the ultimately responsible parties to prepare a response.

If there is additional investigation or characterization that the Department would like to perform, in light of the fact that Aquila has no liability for ultimate cleanup costs because it never operated the MGP, Aquila urges the Department to involve the parties primarily responsible at this stage. To aid the Department, Aquila provides below its research regarding the operational and corporate history of the Council Bluffs FMGP.

On October 10, 1889, the property was sold by George F. Wright to the Council Bluffs Gas Light Company. *See October 10, 1889 Warranty Deed from George F. Wright and wife Ellen E. and Joel Eaton, unmarried to The Council Bluffs Gas & Electric Light Company* (Tab B). On October 10, 1889, the MGP property was transferred to the Council Bluffs Gas & Electric Light Company. *See October 10, 1889 Warranty Deed from George F. Wright and wife Ellen E. and Joel Eaton, unmarried to The Council Bluffs Gas & Electric Light Company* (Tab B). The Council Bluffs Gas & Electric Light Company was liquidated in bankruptcy in 1898, and the property was transferred in that year by the Master Commissioner to Frank T. True. *See December 17, 1898 Master's Deed from Lewis W. Ross, Master Commissioner to Frank T. True* (Tab C). On January 4, 1899, Frank and Anna True deeded the property to Council Bluffs Gas & Electric Company. *See January 4, 1899 Special Warranty Deed from Frank T. True and wife Anna C. to The Council Bluffs Gas & Electric Company* (Tab D).

From 1899 through 1928, the MGP was operated by predecessors to the Omaha Public Power District ("OPPD"). On November 13, 1900, the Citizens Gas & Electric Company was incorporated in New Jersey. *See Moody's Public Utility Manual* (hereinafter "*Moody's*"), 1922 (Tab E). On December 24, 1900, the Council Bluffs Gas & Electric Company leased the MGP property to Citizens Gas & Electric Company of Council Bluffs for a period of 99 years. *See December 24, 1900 lease from Council Bluffs Gas & Electric Company to Citizens Gas & Electric Company, Council Bluffs* (Tab F).

In 1903, the Omaha Electric Light & Power Company acquired control of both Citizens Gas & Electric Company of Council Bluffs and of New Omaha, Thomson-Houston Electric Light Company. *See Moody's, 1914* (Tab G); *See also* Omaha Public Power District's web site at [www.oppd.com/whoweare/earlyyrs.htm](http://www.oppd.com/whoweare/earlyyrs.htm). On January 15, 1904, Council Bluffs Gas & Electric Company deeded the MGP property to Citizens Gas & Electric Company of Council Bluffs. *See January 15, 1904 Deed from Council Bluffs Gas & Electric Company to Citizens Gas and Electric Company* (Tab H). At that same time, the Council Bluffs Gas & Electric Company was merged into Citizens Gas & Electric Company of Council Bluffs. *See Moody's, 1922* (Tab E).

On April 23, 1917, the Nebraska Power Company was incorporated as the successor to the Omaha Electric Light & Power Company, the parent company of Citizens Gas & Electric Company of Council Bluffs. *See Moody's, 1918* (Tab I). The Nebraska Power Company continued to operate Citizens Gas & Electric Company of Council Bluffs as its subsidiary.

On June 1, 1928, the Citizens Gas & Electric Company sold the MGP property to Council Bluffs Gas Company. This was an asset purchase that did not provide for the assumption of any liabilities by the purchaser, Council Bluffs Gas Company. *See June 1, 1928 Agreement between Citizens Gas & Electric Company of Council Bluffs and Council Bluffs Gas Company* (Tab J). Subsequent to that sale, the Citizens Gas & Electric Company changed its name to Citizens Power & Light Company. *See Moody's, 1945* (Tab K). On June 1, 1937, the Citizens Power & Light Company was merged into the Nebraska Power Company. *See Moody's, 1945* (Tab K).

On December 26, 1944, the Omaha Electric Committee, Inc. purchased all of the outstanding stock of the Nebraska Power Company. In 1945, the OPPD was formed, and in 1946 the OPPD purchased the Nebraska Power Company from the Omaha Electric Committee. *See Omaha Public Power District v. O'Malley*, 216 F.2d 764, 767 (8<sup>th</sup> Cir. 1954). In that transaction, OPPD "assumed and agreed to pay all of the obligations of the Nebraska Power Company." *Id.*

From 1928 through 1932, when MGP operations ceased, the plant was operated by the Council Bluffs Gas Company. During this period of time, the Council Bluffs Gas Company initially was controlled by Union Utilities Inc. *See Moody's, 1929* (Tab L). On October 1, 1929, all of the stock of the Council Bluffs Gas Company was transferred to Lone Star Gas Corporation. *See Moody's, 1944* (Tab M). Lone Star Gas Company was incorporated on December 11, 1942, as the successor to Lone Star Gas Corporation. *See Moody's, 1944* (Tab M). Lone Star Gas Company changed its name to ENSERCH Corporation on October 10, 1975. In 1997, ENSERCH Corporation merged with Texas Utilities, which changed its name to TXU Corp. in 1999. *See* [www.txucorp.com/about/history.com](http://www.txucorp.com/about/history.com).

In addition to the owners and operators described above, two other potentially responsible parties exist. First, at the time that Nebraska Power Company was incorporated in 1917 to be the successor to Omaha Electric Light & Power, Nebraska Power Company was owned and controlled by American Power & Light Company. *Moody's, 1928* (Tab N). American Power & Light Company was a subholding company subsidiary of Electric Bond & Share Company. *See American Power and Light Co. v. Securities and Exchange Comm'n*, 141 F.2d 606 (1<sup>st</sup> Cir. 1944). The court in this case found that "it is clear and undisputed that Bond & Share controls American . . .; and that such control pervades the whole of these subholding company systems in a most

comprehensive manner. *Id.* at 615. American Power & Light Company was dissolved in 1946. In 1968, Electric Bond & Share Company changed its name to Ebasco Industries, Inc. In 1969, Ebasco Industries was merged into Boise Cascade Corporation.

Also, in the late 1960s the Iowa Department of Transportation ("IDOT") obtained a right of way through the site for construction of Highway 192. In the early 1970s, during the construction of the highway, it appears that IDOT may have punctured an underground gasholder. (Tab O).

As mentioned, Aquila looks forward to future discussion and encourages the Department to involve the parties responsible for MGP operations at this stage.

Please feel free to contact me with any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jane E. Schilmoeller". The signature is fluid and cursive, with a long horizontal stroke at the end.

Jane E. Schilmoeller

JES:pjh  
Enclosures (via regular mail)

cc: Michael Leat  
Ivan Vancas  
Tracy Peterson  
Gene Russell  
Bob Beck  
Ed Clement